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No. 80-2032

In the Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN LAW ASSOCIATION, PETITIONER

v.

JOHN MERKEL, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner seeks review of an order of the court of appeals dismissing as moot its appeal from the district court's denial of its motions to quash certain subpoenas issued by a federal grand jury.

The pertinent facts may be summarized as follows: On January 28, 1980, a grand jury investigation of Karl L. Dahlstrom, R. Bruce Ripley, Hiram E. Conley, Gaze Durst and David J. Morris was commenced in the Western District of Washington (Pet. App. 4B). Pursuant to this investigation, certain subpoenas were issued to various financial institutions for their records pertaining to transactions of these individuals and their closely related organizations (Pet. App. 5B).

On April 28 and May 7, 1980, petitioner, an unincorporated association of which Dahlstrom, Ripley and Conley were members, moved to quash these subpoenas on the ground that production of the requested information would violate the First Amendment rights of its members (A. 28-29).[1] In an affidavit filed in response to the motions, the government attorney conducting the investigation stated that the grand jury was investigating possible violations of Sections 7201, 7206(1), and 7206(2) of the Internal Revenue Code of 1954 (26 U.S.C.) and 18 U.S.C. 371 by Dahlstrom and others, and that the information subpoenaed was relevant to the determination of whether the crimes under investigation had been committed (A. 64-66).

On May 19, 1980, following a hearing on petitioner's motion to quash, a magistrate recommended that the motions be denied (Pet. App. 1B-10B), and on May 28, 1980 the district court denied petitioner's motions to quash (Pet. App. 11B-12B). On June 2, 1980, the court denied petitioner's motion for an injunction barring compliance with the subpoenas pending appeal (A. 94). On the same date, the court of appeals denied petitioner's motion for an injunction pending appeal, and shortly thereafter, denied petitioner's motion for reconsideration. The financial institutions thereupon fully complied with the subpoenas. After compliance, the court of appeals granted the government's motion to dismiss as moot petitioner's appeal (Pet. App. 1A-2A). The grand jury subsequently returned an indictment against Dahlstrom, Ripley, Conley, Durst and Morris (CR 81-116R, Western District of Washington at Seattle), and the grand jury investigation was terminated.

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[1] "A." refers to the separately bound excerpts of the record filed by petitioner in the court of appeals.

1. Petitioner contends (Pet. 9-16) that the court of appeals erred in dismissing its appeal as moot even though the financial institutions' compliance with the subpoenas removed the only issue in this case. But, as this Court recently observed, "a federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.' " *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975), quoting *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). Here, the subpoenas sought production of certain documents. Upon the district court's denial of petitioner's motions to quash, and subsequent denials by the district court and the court of appeals of petitioner's applications for injunctions pending appeal, those documents were produced. Accordingly, the court below correctly held that there is no longer a live dispute between petitioner and the government, and that the case was moot. See *United States* v. *Arthur Andersen & Co.*, 623 F. 2d 720 (1st Cir. 1980), cert. denied, No. 80-311 (Dec. 1, 1980); *United States* v. *Deak-Perera Int'l Banking Corp.*, 610 F. 2d 89 (2d Cir. 1979); *Kurshan* v. *Riley*, 484 F. 2d 952 (4th Cir. 1973); *United States* v. *Hankins*, 565 F. 2d 1344 (5th Cir.), clarified on other grounds and rehearing denied, 581 F. 2d 431 (1978), cert. denied, 440 U.S. 909 (1979); *United States* v. *Patmon*, 630 F. 2d 458 (6th Cir. 1980); *United States* v. *Olson*, 604 F. 2d 29 (8th Cir. 1979); *SEC* v. *Laird*, 598 F. 2d 1162 (9th Cir. 1979).

2. Contrary to petitioner's contention (Pet. 15), the court's order in this case does not sufficiently "crystalize" a conflict with *In re Special April 1977 Grand Jury* (appeal of William J. Scott), 581 F. 2d 589 (7th Cir.), cert. denied, 439 U.S. 1046 (1978), to warrant review by this Court. In *Scott*, the court concluded that a challenge to certain federal grand jury subpoenas by the subject of the investigation was not moot, even though there had been full compliance prior to

consideration of the appeal. As the court saw the matter, the controversy was capable of repetition yet evading review because further subpoenas would likely be issued by that grand jury, and the period of time between the district court's order enforcing the subpoenas and compliance by the subpoenaed parties was too short to allow the action to be fully litigated.[2] The court accordingly affirmed the denials of the motion to quash. Although we believe that *Scott* wrongly concluded that the case was not moot (see Memorandum for the United States in Opposition in *William J. Scott, Attorney General of Illinois* v. *United States of America*, No. 78-403, 1978 Term, at 2-3 n.3), the court there did not speak to the basic principles of mootness applied by the other courts of appeals in cases such as *SEC* v. *Laird, supra* (see page 3, *supra*). Since it is unclear whether the Seventh Circuit would hold that the instant case was not moot, review by this Court is not warranted at this time.

At all events, *Scott* is distinguishable on its facts. There, the grand jury was conducting a continuing investigation and it was possible to conclude that the issue was capable of repetition. Here, on the other hand, the grand jury investigation has been terminated. It is therefore unlikely that there could be a repetitious demand for information pertaining to petitioner's financial affairs. Moreover, to the extent that there was ever any threat of harm to petitioner's rights, that harm has occurred, and any resolution by this Court of the asserted conflict "cannot affect the rights of

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[2]Cf. *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498 (1911); *Weinstein* v. *Bradford*, 423 U.S. 147 (1975). See also *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976); *United States* v. *New York Telephone Co.*, 434 U.S. 159 (1977); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973); *Doe* v. *Bolton*, 410 U.S. 179 (1973); *United States* v. *Frumento*, 552 F. 2d 534, 536-541 (3d Cir. 1977) (en banc); *In re United States of America, Etc.*, 610 F. 2d 1148 (3d Cir. 1979).

[the] litigants in" this case. Compare *Preiser* v. *Newkirk*, *supra*, 422 U.S. at 401-402; *North Carolina* v. *Rice*, *supra*, 404 U.S. at 246.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

LAWRENCE G. WALLACE
Acting Solicitor General

JULY 1981

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[3]Petitioner's request (Pet. 17) that the case be decided on the merits is inappropriate. The court of appeals did not address the merits of petitioner's First Amendment argument. The court simply dismissed the appeal as moot, and it is the mootness question as to which petitioner seeks certiorari.

Moreover, there is no basis for petitioner's claim (*ibid.*) that the federal grand jury should be barred, on First Amendment grounds, from inquiring into the possible existence of criminal activity by its members. It is true that federal grand juries must "operate within the limits of the First Amendment" in conducting their investigations. *Branzburg* v. *Hayes*, 408 U.S. 665, 708 (1972). Petitioner has failed, however, to demonstrate that issuance of the subpoenas under scrutiny here violated the First Amendment rights of its members. The affidavits (A. 4-5, 30, 54) fall far short of demonstrating that enforcement of the subpoenas presented a substantial, objective threat to the First Amendment rights of its members. Compare *NAACP* v. *Alabama*, 357 U.S. 449, 462-463 (1958). See *Buckley* v. *Valeo*, 424 U.S. 1, 69-73 (1976); *Laird* v. *Tatum*, 408 U.S. 1, 10-16 (1972); *In re Grand Jury Proceedings Witness Bardier*, 486 F. Supp. 1203, 1211 (D. Nev. 1980).

Finally, petitioner's suggestion (Pet. 20-23) that the government has not made a sufficient showing of need for the subpoenaed information ignores the fact that there was a full hearing on that issue before the magistrate. In a report and recommendation adopted by the district court, the magistrate found that the grand jury was conducting a legitimate investigation into the promotion of possibly illegal tax evasion schemes by named individuals, and that the government had satisfied its burden of proving that it "has an immediate and compelling interest in the subject of the investigation and that there is a substantial connection between the financial records sought and the crimes under investigation" (Pet. App. 5B-8B).